

# Decision of the Players' Status Chamber

passed on 4 July 2023

regarding a contractual dispute concerning the player Kayke Fernandes Melo

**BY:**

**Gregory DURAND (France)**

**CLAIMANT:**

**Santos Futebol Clube, Brazil**

Represented by CCLA Advogados

**RESPONDENT:**

**U.D Almeria, Spain**

Represented by 14 Sports Law

## I. Facts of the case

1. On 18 July 2022, the Brazilian club, Santos (hereinafter: *the Claimant*) and the Spanish club Almería UD (hereinafter: *the Respondent*) parties concluded a Transfer Agreement to establish the terms and conditions of the transfer of the player Kayke Fernandes Melo from the Claimant to the Respondent.
2. The transfer fee was set at EUR 7,000,000, as follows:
  - EUR 1,500,000 on 30 October 2022,
  - EUR 1,500,000 on 30 October 2023,
  - EUR 1,500,000 on 30 October 2024
  - EUR 1,500,000 on 30 October 2025
  - EUR 1,000,000 on 30 October 2026
3. In addition, following Clause 3.1., the Claimant was granted a sell-on fee of 20% based on the difference between the future transfer fee and the initial transfer fee paid to Santos, as stated in clause 3.1.
4. According to clause 2.10, Santos was authorized to assign the receivables related to the Transfer Fee to a bank or financial institution. In particular, said clause was drafted as follows:

*"2.10. In the event SANTOS FC decides to assign receivables to a certain bank and/or financial institution, ALMERIA will acknowledge and countersign the relevant sale and assignment of accounts receivable, after being revised by its legal advisors, and will confirm that the payment shall be effected into the stated account of the bank by signing the Notification of Assignment once SANTOS FC has notified the sale and assignment receivables to ALMERIA, subject to not having any liability towards the bank. In any event ALMERIA shall not bear any costs with such assignment that exceed a total amount of interest of 5.1% referring to the payments set forth in Clause 2.1. (i), (ii) and (iii) above. ALMERIA shall not pay for, or bear, any additional costs, such as restructuring fees, legal fees, etc. attached to the assignment."*
5. Clause 2.11 stated that if Santos did not assign the receivables within 30 days from the signature date of the Transfer Agreement, the first three instalments would become due immediately, and the Respondent would be responsible for payment within 15 days of notification by Santos.
6. Clause 2.12 stipulated that in the event Almería fails to make the payment set out on Clause 2.1 or 2.11, if applicable, on the due dates agreed herein, an interest at the rate of five percent (5%) per year shall be applied from the due date until the date of the complete payment.
7. Subsequently, the Claimant entered into a prearrangement with the following companies in relation to the assignment of receivables: Superfute Trade Finance Partners Limited ("Superfute") and BHP Assets Management (BVI) Limited, acting also on behalf of its affiliates in BHP Luxembourg (hereinafter jointly referred to as *"the Assignees"*).
8. Within this context, on 12 August 2022, the Parties signed an Amendment to the Transfer Agreement with the following contents:

*“After the signature of the Transfer Agreement, SANTOS FC has expressed its intention to anticipate the first three (3) instalments of the Transfer Fee in a financial institution, which will entail for SANTOS FC the payment of interests amounting to €274.772 (...), while SANTOS FC and ALMERIA have agreed that said amount shall be anticipated by ALMERIA, irrespective of the terms of Clause 2.10 of the Transfer Agreement, subject to the terms of the present Agreement.”*

9. According to said amendment, Almería accepted to pay EUR 274,772 within 10 day following the issuance of the player’s International Transfer Certificate (ITC).
10. On 23 August 2022, the Claimant and the Assignees signed a nonbinding Term Sheet in which were defined the terms of the assignment of credits, as follows:  
*Total Receivable Value EUR: 4.500.000,00*  
*Receivable Installments EUR: 1,500,000 - 10 October 2022*  
*EUR: 1,500,000- 10 October 2023*  
*EUR: 1,500,000 - 10 October 2024*
11. On 22 August 2022, Santos sent a notice to the Respondent informing that receivables have been assigned to, *inter alia*, Superfute Trade Finance as per the Term Sheet, for the total amount of EUR 4,500,000.
12. On 28 August 2022, the Respondent paid to Santos EUR 274,272 to cover the costs charged by the Assignees.
13. On 9 September 2022, the Spanish Tax Authority (AEAT) informed the Respondent that the amount of EUR 3,374,099.48 was seized due to a debt of the Claimant towards the AEAT.
14. In particular, following said decision, the Spanish Tax Authority seized all credits in favor of Santos that would be due, until the amount of EUR 3,374,099.48 would be covered.
15. On 15 September 2022, the Respondent sent an e-mail to the Claimant informing about a notice received from the AEAT.
16. On 16 September 2022, the Claimant sent a Termination Letter informing about the termination of the Term Sheet due to the breach by the Assignees.
17. On 22 September 2022, the Claimant sent an e-mail to the Respondent informing that the assignation of receivables made to the Assignees was cancelled.
18. On 26 September 2022, Claimant sent a formal notice about the cancelation of the assignment, stating the following:  
*“We inform that the assignment of receivables to Superfute Trade Finance Partners Limited (“Superfute”) and BHP Assets Management (BVI) Limited (“BHP”) was cancelled by Santos Futbol Clube. No credit of SANTOS FC, regarding the transfer of the athlete Kaiky, must be to Superfute or BHP. We ask UD Almeria to sign and send the communication attached, recognizing the cancelation, as a matter of urgency, so we can move on with the negotiation with another institution.”*
19. On 28 September 2022, the Respondent sent an email to the Claimant indicating the following:

*“we would like to inform you that (...) we received an embargo notice from the Spanish tax authorities, which is attached to this email in the amount of 3,374,099.48 euros, so we cannot sign any agreement for payment to third parties, since, until we cover the debt, we must pay the amount to the tax agency, unless you regularize the situation before the Spanish tax authorities.”*

20. On 3 October 2022, the Claimant sent a default notice to the Respondent requesting the payment of the full amount of the Transfer Fee with the reduction of the paid amount as well as of the amount anticipated to cover the costs of the assignment of receivables, which result in an amount of EUR 851,128.52.
21. The Respondent invited the Claimant to accept another agreement for the anticipation of the amount due which was refused.
22. On 22 November 2022, Santos sent a last e-mail requesting that the Respondent to send a proof of payment to the Spanish Authorities of the amount due by Santos as well as to inform a prevision of date for the payment of amount of EUR 851,128.

## II. Proceedings before FIFA

1. On 17 February 2023, the Claimant lodged a claim before FIFA and requested the following:
  - a. To present the proof of payment of the amount of EUR 3,374,099.48 to the Spanish Tax Authorities on behalf of Santos and to pay Santos the remaining amount of EUR 851.128,52 plus interest of 5% p.a. as per clause 2.12 of the Transfer Agreement;
  - b. In case no payment was made to the Spanish Tax Authority, the total amount of EUR 4.225.728 plus interest of 5% p.a. as per clause 2.12 of the Transfer Agreement;
2. The Claimant argued that the Respondent breached the agreement by not paying EUR 4,500,000 without any reason and failing to comply with their financial obligation within the given deadlines.
3. According to the Claimant, clause 2.10 of the transfer agreement was made in view of the Respondent's lack of financial means.
4. In its reply, the Respondent considered that the Claimant acted in bad faith by withholding information about its debt to the Spanish Tax Authorities in order to deceive it into accepting Clause 2.11 of the Transfer Agreement.
5. According to the Respondent, it accepted this clause without knowing that, due to the existence of Santos' debt towards the Spanish Tax Authorities, such assignment would never be feasible or possible.
6. The Respondent underlined that it was completely unaware of the Claimant debt towards the Spanish Tax Authorities for the total amount of EUR 3,374,099.48, which represents almost half of the Fixed Transfer Fee agreed between the Parties for the transfer of the Player.
7. As a result, the Respondent considered this clause is deemed null and void. Hence, following this party, the payment of the Fixed Transfer Fee shall follow the deadlines established under Clause 2.1 of the Transfer Agreement.
8. The Respondent explained that, considering that Santos did not perform any payment to the Spanish Tax Authorities in order to settle its debts, it is -and currently still is- prevented from performing any payment established under the Transfer Agreement directly to Santos and/or the Assignees.
9. Nevertheless, the Respondent argued that "*in an extreme act of good faith*" it proposed to anticipate the amount of EUR 851.128,52, i.e., the balance between the amount of EUR 4,500,000 , minus (i) Santos's debt towards the Spanish Tax Authorities in the amount of €3,374,099.48, and minus (ii) the amount already anticipated by Almeria under the Amendment of the Transfer Agreement in the amount of EUR 274,772.
10. Almería further explained that that the first instalment of the Fixed Transfer Fee established under Clause 2.1 of the Transfer Agreement in the amount of EUR 1,500,000 became due and payable on 30 October 2022, it has paid it directly to the Spanish Tax Authorities. Almería further

argued that it will also perform the payment of the second instalment, and part of the third instalment of the Fixed Transfer Fee directly to the Spanish Tax Authorities within the deadlines established between the Parties under Clause 2.1 of the Transfer Agreement, i.e., 30 October 2023 and 30 October 2024 respectively.

11. *"In the unlikely scenario that FIFA decides otherwise"*, the Respondent argued that it is evident that Santos terminated the agreement in bad faith to prevent the fulfilment of a condition that would have made the clause inapplicable.
12. In his *replica*, the Claimant underlined that it is vital to clarify that the center topic of the case at stake it is the application of clauses 2.10 and 2.11 of the Transfer Agreement.
23. The Claimant highlighted that the assignment of the credit was a right, not an obligation.
24. The Claimant explained that only due to the Player's willingness to be transferred to Spain and the Respondent's lack of financial means to pay the full amount for his transfer, it agreed with the possibility of an assignment of credits subjected to two conditions: that Almeria should bear the financial cost of the assignment of credit, and that in case it was not able to secure the assignment, Almeria should be liable to pay the full amount of EUR 4,500,000.
25. The Claimant thus considered that the assignment of credits was set as a benefit for the Respondent.
26. In relation to the debt towards the Spanish Tax Authority, the Claimant considered it to be a "conspiracy theory" describing a "diabolical plan". Instead, the Claimant stated that the disputed clause was the result of clear negotiations between the parties.
27. The Claimant further disagreed that an amount is due to the Spanish tax authorities and explained that it contested it through his lawyers in Spain.
28. Hence, the Claimant stated that in good faith, it told Almería that it could retain the amount solicited by the Spanish Tax Authority and pay only the difference minus the amount already paid as interest.
29. In its *duplica*, the Respondent confirmed its previous position.
30. The Respondent pointed out that the Claimant failed to address its remarks with regards to (i) the fact that Santos did not disclose its debts towards the Spanish Tax Authorities to Almeria, (ii) the Claimant's own initiative of terminating the dealings with the Assignees, and (iii) its refusal to even consider the alternative of anticipating the amount of EUR 851.128,52 presented by Almeria in good faith.
31. The Respondent argued that, despite the Claimant's allegations presented in its replica, under Clauses 2.10 and 2.11 of the Transfer Agreement, the Claimant was not obliged to attempt to assign instalments of the Fixed Transfer Fee.
32. According to the Respondent, the attempt of the Claimant to secure such assignment in good faith was a precedent condition for the applicability of the abovementioned Clauses.

### III. Considerations of the Players' Status Chamber

#### a. Competence and applicable legal framework

1. First of all, the Single Judge of the Players' Status Chamber (hereinafter also referred to as *the Single Judge* or *the Judge*) analysed whether he was competent to deal with the case at hand. In this respect, it took note that the present matter was presented to FIFA on 21 February 2023 and submitted for decision on 4 July 2023. Taking into account the wording of art. 34 of the March 2023 edition of the Procedural Rules Governing the Football Tribunal (hereinafter: *the Procedural Rules*), the aforementioned edition of the Procedural Rules is applicable to the matter at hand.
2. Subsequently, the Single Judge referred to art. 2 par. 1 of the Procedural Rules and observed that in accordance with art. 23 par. 1 in combination with art. 22 lit. f) of the Regulations on the Status and Transfer of Players (March 2022 edition), the Players' Status Chamber is competent to deal with the matter at stake, which concerns a dispute between a club from Brazil and a club from Spain.
3. Subsequently, the Single Judge analysed which regulations should be applicable as to the substance of the matter. In this respect, it confirmed that, in accordance with art. 26 par. 1 and 2 of the Regulations on the Status and Transfer of Players (March 2023 edition), and considering that the present claim was lodged on 21 February 2023, the October 2022 edition of said regulations (hereinafter: *the Regulations*) is applicable to the matter at hand as to the substance.

#### b. Burden of proof

4. The Single Judge recalled the basic principle of burden of proof, as stipulated in art. 13 par. 5 of the Procedural Rules, according to which a party claiming a right on the basis of an alleged fact shall carry the respective burden of proof. Likewise, the Chamber stressed the wording of art. 13 par. 4 of the Procedural Rules, pursuant to which it may consider evidence not filed by the parties, including without limitation the evidence generated by or within the Transfer Matching System (TMS).

#### c. Merits of the dispute

5. His competence and the applicable regulations having been established, the Single Judge entered into the merits of the dispute. In this respect, the Single Judge started by acknowledging all the above-mentioned facts as well as the arguments and the documentation on file. However, the Single Judge emphasised that in the following considerations he will refer only to the facts, arguments and documentary evidence, which it considered pertinent for the assessment of the matter at hand.

#### i. Main legal discussion and considerations

6. The foregoing having been established, the Single Judge recalled the main facts that led to the dispute. In particular, the Judge observed that, on 18 July 2022, the parties concluded a transfer agreement by means of which the Respondent committed to pay to the Claimant a total fee of EUR 7,000,000, as indicated in point I. 1 above.
7. The Judge further noted that the parties also stipulated in the applicable transfer contract a clause 2.10, according to which the Claimant was authorized to assign the receivables related to the Transfer Fee to a bank or financial institution. The Judge also verified that, following an amendment on 12 August 2022, the parties agreed that the first 3 instalments could be assigned to a third party, for a total amount of EUR 4,500,000 (EUR 1,500,000 on 30 October 2022, EUR 1,500,000 on 30 October 2023, EUR 1,500,000 on 30 October 2024).
8. Nevertheless, and as confirmed by both parties, the Judge noted that, ultimately, this assignation failed to materialize. In particular, the Judge observed that, although the parties tried to implement this provision, the implementation of art. 2.10 of the agreement was unsuccessful.
9. As a result, the Judge understood that he should first and foremost determine the legal consequence of this failure to assign the payments to a third party, as foreseen in clause 2.10 of the transfer agreement.
10. In particular, the parties did not agree to the assignment of the receivables. As a result, the agreement to assign the receivables became void due to the parties' lack of agreement as how clause 2.10 should be implemented. The Single Judge then determined that there was a the lack of agreement on this point. As a result, clause 2.11 is applicable and the "first three instalments would become due immediately". Nevertheless, the Single Judge understood from the remarks of both parties that this point was not challenged and the both Parties considered, and then agreed, that the original payment schedule, as stipulated in the transfer agreement remains in effect. The Judge therefore concluded that the Respondent needs to comply with the original payment schedule, as indicated in point I. 1 above.
11. The Single Judge then went on to examine the following main legal issues of the matter at stake, i.e. the influence of a decision of the Spanish Tax Authority (AEAT) as to the existing contractual obligations between the parties.
12. Indeed, the Single Judge observed that, on 9 September 2022, AEAT informed the Respondent that the amount of EUR 3,374,099.48 was seized and that all payments from the Respondents towards the Claimant would be withheld until this full amount is settled.
13. Within this context, the Single Judge took note of the claim of the Claimant, which fundamentally requested the Respondent to provide evidence of a payment of EUR 3,374,099.48 to the AEAT on behalf of Santos, with an additional payment of EUR 851,128.52 plus 5% interest per annum as per clause 2.12 of the Transfer Agreement. In the absence of such payment, the Claimant requested the payment of the total amount of EUR 4,225,728 and arising from the transfer agreement.



14. On this note, the Single Judge verified that the Respondent proved that it paid the first instalment of EUR 1,500,000 directly to the AEAT.
15. Hence, the Single Judge understood that the main legal issue at stake was to determine which financial obligations, if any, were still outstanding between the parties. In other words, the Single Judge needed to decide which amounts are potentially still due by the Respondent to the Claimant in connection with the transfer agreement.
16. The Judge also wished to clarify on this point his competence given the relevance of the role of the AEAT in this matter. The Judge emphasized, as per the applicable Regulations and jurisprudence, that he is not competent to determine tax liabilities under national law. However, the Judge also emphasized that, pursuant to Art. 22 par. 1 lit. f of the Regulations, he is competent to determine contractual obligations between clubs belonging to different associations that may arise from a transfer contract. In addition, the Judge is also able to determine such obligations by considering all information gathered during the proceedings, including information concerning taxes that were payable. As such, the Judge considered that the tax dimension of the case does not prevent FIFA from rendering a decision within the sphere of his competence, namely, the determination of an alleged outstanding transfer fee. This is since the dispute ultimately concerned the determination of the exact amount that was due by the Respondent to the Claimant in the context of the international transfer of a player.
17. The Judge also noted that it does appear that the Respondent fundamentally acknowledged the existence of debt towards the AEAT, in the amount of EUR 3,374,099.48. The Single Judge noted that the Claimant, in its *duplica*, contests said debt but provides no substantive argument in this regard. Therefore, the Judge verified that, based on the information on file, that the Respondent appears to be liable to cover the aforementioned debt towards the AEAT (in accordance with the current state of the alleged proceedings before the AEAT).
18. Therefore, given that, as explained above, (1) the original payment schedule needs to be respect (2) the AEAT seized all due amounts up to the settlement of a debt EUR 3,374,099.48, the Judge therefore understood that the Respondent shall pay to the Claimant the agreed transfer fee of EUR 7,000,000 in accordance with the original schedule, i.e. five instalments of EUR 1,500,000 between 30 October 2022 until 30 October 2026. However, in compliance with the applicable tax legislation, the single Judge considered that he shall determine said payments within the parameters established by the AEAT, up until said debt is settled.
19. In addition, the Judge also verified that, as per the Amendment to the Transfer Agreement, the Respondent paid EUR 274,772 on 28 August 2022 as costs for the assignment. Yet, given that, as explained in the paragraphs, that the assignment became void as it failed to materialize, the Judge understood that said amount shall be offset from the due transfer fee, as it was already paid. The Judge also noted that the Claimant implicitly agreed with this aspect in his claim.

20. With this idea in mind, the Judge proceeded to establish the monies that would be payable by the Respondent to the Claimant as per the transfer agreement, by also considering the amounts that shall be withheld and paid directly to the AEAT:

Due date:	Due to AEAT	Balance to AEAT	Transfer fee:	Balance towards Santos	Remaining transfer fee (Transfer fee minus debt to AEAT):
	<b>3.374.099,48</b>		<b>7.000.000</b>		3.625.900,52
	Paid to AEAT		Instalments:		
30 Oct 22	1.500.000,00	1.874.099,48	1.500.000,00	0,00	
30 Oct 23	1.500.000,00	374.099,48	1.500.000,00	0,00	
30 Oct 24	374.099,48	-	1.500.000,00	1.125.900,52	
30 Oct 25	-	-	1.500.000,00	1.500.000,00	
30 Oct 26	-	-	1.000.000,00	1.000.000,00	3.625.900,52
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			Paid on 28 August 2022	274.772,00	
			Other deduction:		
					<b>TOTAL:</b>
					<b>3.351.128,52</b>

21. In sum, as it can be seen in the table, the Single Judge established that the amount USD 3,351,128.52 would potentially be still due by the Respondent to the Claimant payable as per the transfer agreement, once the Respondent performs the necessary deductions towards the AEAT.
22. However, the Single Judge observed that, following said table, the next instalment after performing the relevant deductions. However, the next instalment to be paid by Almería to Santos, in the amount of EUR 1,500,000, is due on 30 October 2024, insofar the previous amounts are withheld by the AEAT.
23. Thus, given that the next payable instalment would be due on 30 October 2024, the Single Judge determined that he is not in a position to order a payment that is not yet outstanding. In addition, the Single Judge underlined that, based on the information on file, the decision rendered by the AEAT might be susceptible to appeal, rendering it non-final at this stage. As a result, the Single Judge could only determine that the claim of the Claimant is premature.

#### d. Costs

24. Finally, the Single Judge referred to art. 25 par. 1 and 2 of the Procedural Rules, according to which in disputes between clubs, costs in the maximum amount of USD 25,000 are levied. As per art. 25 par. 5 of the Procedural Rules, the Single Judge will decide the amount that each party is due to pay, in consideration of the parties' degree of success and their conduct during the procedure, as well as any advance of costs paid.
25. The Single Judge, having considered the Claimant's claim, concluded that it was not without merit. However, the Judge also found that the dispute had arisen in part due to the Claimant's own actions, particularly in relation to its tax management issues. The Single Judge therefore concluded that the costs of the proceedings before FIFA shall be split between the parties. According to Annexe A of the Procedural Rules, the costs of the proceedings are to be levied on the basis of the amount in dispute. Consequently, the Single Judge concluded that the maximum amount of costs of the proceedings corresponds to USD 25,000.
26. In light of the above, the Single Judge determined the costs of the current proceedings to the amount of USD 25,000 and concluded that said amount has to be paid by the Claimant and the Respondent in order to cover the costs of the present proceedings, in the following manner: USD 7,500 payable by the Claimant and USD 7,500 payable by the Respondent.

#### **IV. Decision of the Players Status Chamber**

1. The claim of the Claimant, Santos Futebol Clube, is premature.
2. The final costs of the proceedings in the amount of USD 25,000 are split between the parties and shall be paid to FIFA in the following manner:
  - a) USD 12,500 by the Claimant. As the Claimant already paid the amount of USD 5,000 to FIFA as advance of costs at the start of the proceedings, the residual amount of USD 7,500 is still to be paid as procedural costs.
  - b) USD 12,500 by the Respondent, UD Almería.

For the Football Tribunal:



**Emilio García Silvero**

Chief Legal & Compliance Officer

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**NOTE RELATED TO THE APPEAL PROCEDURE:**

According to article 57 par. 1 of the FIFA Statutes, this decision may be appealed against before the Court of Arbitration for Sport (CAS) within 21 days of receipt of the notification of this decision.

**NOTE RELATED TO THE PUBLICATION:**

FIFA may publish this decision. For reasons of confidentiality, FIFA may decide, at the request of a party within five days of the notification of the motivated decision, to publish an anonymised or a redacted version (cf. article 17 of the Procedural Rules Governing the Football Tribunal).

**CONTACT INFORMATION**

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